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In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

KATHRYN A. OBERLY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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INTEREST OF THE UNITED STATES

The interest of the United States in these cases is premised on its special relationship with, and responsibility for, the Indian tribes within its borders. *United States* v. *Klamath Indians,* 304 U.S. 119, 123; *United States* v. *Kagama,* 118 U.S. 375, 382. In addition, the United States has a unique and direct interest in this proceeding because the state court decisions of which review is sought may

affect rights established in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. The United States brought that federal-court action on its own behalf and in its capacity as trustee for the Indians.

STATEMENT

The present petition raises issues arising out of the 1974 decision of the federal district court in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. In that case, the district court held that certain Indians of the Pacific Northwest, pursuant to treaties with the United States, are entitled to an opportunity to catch up to 50 percent of any run of fish that normally would pass through their off-reservation sites, with adjustments for fish caught beyond state jurisdiction and subsistence and ceremonial fishing (384 F. Supp. at 343-344). To implement its decree, the district court directed the State of Washington to reduce non-Indian fishing to the extent necessary to permit treaty Indians to exercise their fishing rights (*id.* at 420). After the court of appeals affirmed, the case was remanded to the continuing jurisdiction of the district court to ensure implementation by the State of Washington of the Indians' treaty rights (520 F. 2d at 693).

Implementation of the district court decree has remained a problem. The State of Washington has been unable to discharge its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in disregard of state regulations and the district court's mandates. In each fishing season since the decision, the United States and the plaintiff-intervenor tribes have been forced to return to the district court seeking further orders to require compliance with that

court's Final Decision No. 1.[1] At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.[2]

The present cases represent part of the state court litigation. In *Puget Sound Gillnetters Ass'n.* v. *Moos,* 88 Wash. 2d 677, 565 P. 2d 1151 (Pet. App. D), respondents, an individual and an association of commercial non-Indian fishermen, filed an original action for mandamus in the state supreme court, asking that the Washington Department of Fisheries be restrained from promulgating fishing regulations which, as required by the federal decision, would allocate the harvest between treaty and

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[1]As we discuss below, these facts are not contained in the record of this proceeding. However, the record in *United States* v. *Washington,* W.D. Wash., Civil No. 9213, contains evidence of illegal non-treaty fishing and the State's unsuccessful efforts to combat it, as well as the district court's orders attempting to rectify the situation. See, *e.g.*, the following docket entries in *United States* v. *Washington*: Docket Nos. 768, 964, 968, 970, 1148, 1177, 1381, 1494, 1555, 2436, 2511, 2618, 2636, 2787, 3405, 3406, 3420, 3439 and 3945.

[2]In addition to the decisions here sought to be reviewed, see, *e.g.*, *Purse Seine Vessel Owners Ass'n.* v. *Moos,* 88 Wash. 2d 799, 567 P. 2d 205; *Grays Harbor Gillnetters Ass'n.* v. *Sandison,* Wash. Sup. Ct., No. 45144 (argued October 31, 1977); *Puget Sound Gillnetters Ass'n.* v. *Sandison,* Thurston County Super. Ct., No. 58107 (decided August 24, 1977); *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray,* Thurston County Super. Ct., No. 55339 (decided August 25, 1977).

non-treaty fishermen. Neither the United States nor the treaty tribes were parties to the action, although they participated as *amici curiae*.

On June 9, 1977, the state supreme court issued an opinion accepting respondents' arguments though declining to issue the requested writ of mandamus.[3] The court first determined that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation (Pet. App. D-5 to D-7). Asserting that a state agency cannot be compelled to act beyond its statutory authority, the court concluded that the Director thus had no power to restrict non-treaty fishing in order to ensure the Indians their treaty opportunity and comply with federal law (Pet. App. D-8 to D-13).

While resolving these questions in respondents' favor, the court also observed that even if the necessary state authority had existed, any allocation of fishing opportunity between treaty Indians and non-treaty fishermen would violate the constitutional guarantee of equal protection (Pet. App. D-8). Declining to follow the federal court's decision in *United States* v. *Washington*, the court held that the treaties guaranteed to the Indians only the same rights as are enjoyed by all non-treaty fishermen and that the State's regulations thus must treat all fishermen alike (Pet. App. D-15 to D-17).

The State of Washington filed a petition for rehearing, which was denied on October 10, 1977 (Pet. App. C). Although the opinion of the state court normally would

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[3]The court stated (Pet. App. D-4):

> [W]e decline to issue a writ of mandate but will set forth our opinion upon the questions concerning the authority of the department. We have full confidence that the director will abide by our decision.

then have become final, the non-Indian fishing association in the meantime had filed an Emergency Motion for Issuance of Writ of Mandamus. In their motion, they contended that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus which the state court had previously declined to issue was thus required. The full court heard oral argument on the motion on October 31, 1977, and the matter is still under submission.

In *Washington State Commercial Passenger Fishing Vessel Ass'n.* v. *Tollefson,* 89 Wash. 2d 276, 571 P. 2d 1373 (Pet. App. B), the second case of which review is sought, the respondent associations initiated an action for declaratory and injunctive relief in the Superior Court for Thurston County, Washington. (Neither the United States nor the treaty tribes were named as parties, nor did they participate as *amici curiae*.) The superior court held that the challenged state regulations were invalid because they exceeded state statutory authority (Pet. App. G). On appeal, the state supreme court initially dismissed the case as moot, because the fishing season to which the regulations pertained had passed. 87 Wash. 2d 417, 553 P. 2d 113 (Pet. App. F). On petition for rehearing, however, the court agreed to reach the merits and, on November 23, 1977, it issued an opinion reaffirming the conclusions it had reached in *Puget Sound Gillnetters Ass'n.* v. *Moos.*

As the state court litigation gradually indicated that Washington would not be able to comply with the federal court's judgment, the United States and the tribes again invoked the continuing jurisdiction of the district court in *United States* v. *Washington.* That court issued a series of orders during August and September, 1977, designed to protect the Indians' treaty rights. By orders dated August 10 and 31, 1977, the federal court determined the treaty Indians' proper share of the 1977 harvest and expressly

removed that share from the jurisdiction and control of the State of Washington. The court then stated that "[j]urisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants * * * are hereby enjoined from exercising jurisdiction or any form of harvest management authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries * * *" (Memorandum Order and Preliminary Injunction, dated August 31, 1977, p. 19).

This action of the federal court, undertaken "reluctantly, but necessarily" (*id.* at 17), was compelled by the state court rulings that the Department of Fisheries could not lawfully allocate the fish catch. Under the federal court order the Department of Fisheries no longer was required to allocate the catch between treaty and non-treaty fishermen, because it no longer had control over the treaty Indians' share; the Department's only obligation was to ensure that non-treaty fishermen did not harvest fish in excess of the numbers authorized by the federal court. Even this task, however, was frustrated by the state court decisions, which effectively prevented the State from enforcing any restrictions against non-treaty fishermen. At several hearings before the federal court, the State's Assistant Attorney General so admitted, acknowledging that restrictions on non-treaty fishing could be enforced only if the federal court entered an injunction running directly against non-treaty fishermen and punished violators through the contempt process. (See, *e.g.*, *United States* v. *Washington*, Transcript of

August 25, 1977, pp. 59-63; Transcript of August 26, 1977, pp. 31-33; Transcript of August 30, 1977, pp. 20-21.)[4]

Accordingly, on August 31, 1977, and September 27, 1977, the district court issued injunctions against the non-treaty fishermen,[5] prohibiting all net salmon fishing in certain specifically described geographic areas except during such times and in such specific waters as were open by regulations conforming to the court's prior orders.[6] The court directed the State of Washington and the United States to cite any fisherman who, having received notice of the injunction, thereafter fished illegally, and to require him to appear before the court to show cause why he should not be held in contempt. Preliminary Injunction Re: Enforcement of 1977 Fisheries (September 27, 1977), p. 3.

The non-treaty fishermen sought review of the injunctions against them by filing a petition for a writ of mandamus in the federal Court of Appeals for the Ninth

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[4]Respondents herein have also advised the state supreme court that state citations based on violations of state regulations promulgated to comply with the federal judgment are routinely dismissed by the state trial courts. Brief of Petitioners in Support of Application for Writ of Mandamus, filed in September 1976, in *Puget Sound Gillnetters Ass'n.* v. *Moos* (Pet. App. D).

[5]*United States* v. *Washington*, W.D. Wash., Civil No. 9213, Temporary Restraining Order Re: Enforcement of 1977 Fisheries (August 31, 1977); Preliminary Injunction Re: Enforcement of 1977 Fisheries (September 27, 1977); Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders (September 27, 1977).

[6]The procedures for determining open fishing times and areas, which are always subject to change during the season, are specified in the injunction of September 27, 1977.

Circuit. *Puget Sound Gillnetters Ass'n.* v. *United States District Court,* No. 77-3129. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. *United States* v. *Washington,* C.A. 9, Nos. 77-3654 and 77-3655. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals (*United States* v. *Washington,* C.A. 9, Nos. 77-3654 and 77-3655, Order dated November 25, 1977), and the appeals and mandamus proceeding were consolidated and ordered expedited. *Puget Sound Gillnetters Ass'n.* v. *United States District Court,* C.A. 9, No. 77-3129, and related cases, Order dated November 15, 1977. Oral argument in the consolidated cases was heard on February 1, 1978, and a decision is expected shortly.

DISCUSSION

The United States urges that the petition for a writ of certiorari be denied or that action on it be deferred. Although we believe that the decisions below are incorrect as a matter of federal law,[7] these cases do not provide an adequate or appropriate vehicle for resolution of the important conflict that exists between the federal and state courts. The cases awaiting decision by the federal court of appeals can be expected to provide a much more suitable vehicle, and review of the controversy by this Court should await their presentation.

1. The continuing and sensitive controversy over Indian treaty fishing rights in the Pacific Northwest involves not only the State of Washington and non-treaty

[7]In its petition, the State of Washington urges (Pet. 14) that review be granted because the decisions below are " 'probably not in accord with applicable decisions of this court,' " quoting Rule 19(1)(a) of the Rules of this Court.

fishermen, but also the United States and numerous Indian tribes. More than seven years ago the United States brought suit in federal district court to determine the extent of treaty fishing rights in Washington waters and to secure the protection and enforcement of those rights. See *United States* v. *Washington, supra.* The State of Washington had a full opportunity in that case to litigate these questions on behalf of all its citizens (including, of course, non-treaty fishermen), and the district court issued a thorough and considered decision, which the court of appeals affirmed. We believe it would be inadvisable for this Court now to make final determinations regarding those treaty rights, and the manner of their enforcement, in litigation to which neither the United States nor the Indians are parties.[8]

The absence of the United States and the Indian tribes as parties in these lawsuits is especially significant because the actual parties have not developed a full and balanced record. The record in *Puget Sound Gillnetters Ass'n.* v. *Moos,* for example, consists solely of stipulated statements of fact. Although the United States and the tribes advised the courts below that the stipulations were incomplete and inaccurate,[9] neither the parties nor the court made adequate changes in the stipulations and no proof was submitted to supplement them. See *Lord* v. *Veazie,* 8 How. 251, 254-255. By contrast, the federal

[8]As *amici curiae,* the United States and the tribes argued below that they were indispensable parties and that the doctrine of sovereign immunity prevented their joinder. See *Puyallup Tribe, Inc.* v. *Department of Game of Washington,* No. 76-423, decided June 23, 1977. These issues were never addressed by the state supreme court.

[9]See the following briefs filed in *Puget Sound Gillnetters Ass'n.* v. *Moos*: Brief for the United States as *Amicus Curiae* (October 1976), pp. 2-5; Brief for the United States as *Amicus Curiae* (October 1977), p. 3; Brief of *Amici Curiae* (Indian Tribes) (October 1976), pp. 1-4; and Brief of *Amici Curiae* (Indian Tribes) (October 1977), pp. 1-11.

district court in *United States* v. *Washington* had the benefit of a record resulting from three years of intensive discovery and a two-week trial, and produced a 112-page decision dealing with all aspects of off-reservation treaty fishing (384 F. Supp. 312).

Moreover, it cannot be said that the parties to these state court suits are adversaries in a real sense. Virtually all the arguments made below by the non-Indian fishermen were first made by the State of Washington in *United States* v. *Washington.* Although the State did advance arguments in these cases against the position of the non-Indian fishermen, it told the state court that it did not believe those arguments were correct.[10] The State of Washington did not raise as an affirmative defense the possibility that the federal court decision was *res judicata* on many issues in the state court actions. In short, it may be questioned whether the case presents the "honest and actual antagonistic assertion of rights" which, in our adversary system, is a safeguard essential to the integrity of the judicial process. *United States* v. *Johnson,* 319 U.S. 302, 305. See also, *Lord* v. *Veazie, supra.*

If these cases provided the only foreseeable opportunity for this Court to resolve the controversy presented by the opposing views of the state and federal courts, the record defects and lack of adversarial presentation might have to be disregarded. But as we next discuss, cases are now

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[10]See the following briefs filed by the State in *Puget Sound Gillnetters Ass'n.* v. *Moos:* Brief in Response to application for Writ of Mandamus (October 1976), p. 3; and Respondents' Supplemental Responsive Brief to Petitions for Mandamus (October 1977), p. 5. The State did not attempt in these briefs to make the appropriate arguments itself; it merely summarized the position of the United States as set forth in various federal court briefs and then provided the state court with random excerpts from those briefs.

awaiting decision in the Ninth Circuit that can be expected to provide far more satisfactory vehicles for review.

2. The Washington Supreme Court in the instant cases has decided that, whatever the scope of Indian treaty fishing rights, officials of the State of Washington cannot enforce those rights by regulation but may regulate for conservation purposes only. As noted earlier, related questions regarding implementation of the Indian treaty fishing rights are pending before the Court of Appeals for the Ninth Circuit in *Puget Sound Gillnetters Ass'n., et al.* v. *United States District Court,* No. 77-3129, and *United States* v. *State of Washington,* Nos. 77-3654 and 77-3655, argued (on an expedited basis) February 1, 1978. These cases, which involve challenges to nine separate orders of the federal district court issued pursuant to its continuing jurisdiction in *United States* v. *Washington,* will require the court of appeals to consider the proper allocation of enforcement power among the tribes, state officials, federal officials, and the federal judiciary itself.

Should this Court be inclined to review any aspect of the fishing rights controversy, we suggest that these pending federal cases will offer the most appropriate vehicle for such review. First, all interested parties would be before the Court, inasmuch as the non-Indian fishing associations were granted permission to intervene in the State's appeals. Second, the full record in *United States* v. *Washington* would be before the Court. Finally, the problems of implementation, which are not addressed in the state supreme court's decisions, would be squarely presented.

In its petition (Pet. 20-21), the State acknowledges the likelihood that this Court will be asked to review any decision in the pending federal cases. Similarly,

respondents have publicly stated their intent to use the Ninth Circuit cases as a vehicle to obtain review by this Court. Since these cases would be considerably more suitable for full and fair review of the issues than the state cases, we urge that the Court either deny the present petition or defer action on it until the pending federal cases are also before the Court.[11]

3. Finally, we question whether there is presently any final judgment in *Puget Sound Gillnetters Ass'n.* v. *Moos* from which the State of Washington can seek review. See 28 U.S.C. 1257(3). Despite its agreement with most of respondents' arguments, the Washington Supreme Court declined to issue a writ of mandamus against the State or its officials.[12] Moreover, the proceeding has been reopened by filing of the respondents' October 7, 1977, Emergency Motion (see pp. 4-5, *supra*). This Court, therefore, lacks jurisdiction over that case while it is still pending in the state court; although a further order of the state court might remedy the defect, for this Court to grant certiorari now would be at least premature.

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[11]If, before the Court acts on the present petition, the court of appeals decides the pending cases in a way that changes our appraisal of their suitability for review, we will promptly inform the Court in a supplemental memorandum.

[12]Respondents did not cross-petition for a writ of certiorari in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or action on the petition should be deferred until the related federal cases are brought before the Court.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

KATHRYN A. OBERLY,
Attorney.

FEBRUARY 1978.